"The result of a decree of nullity is that not only are the parties now not married but they never were. *There never was any valid marriage...*" (The italics are mine).

and at page 306 Russell J. went on to state:

"Those expressions show that, in the opinion of the judges of the Court of Appeal, a marriage which has been annulled on the ground of impotence was never a marriage at all, although no doubt, it is recognized as valid until one of the parties to it takes proceedings to annul it."

and at page 307 said:

"Therefore there never was a marriage although the ceremony was gone through, and the parties lived together as man and wife after that date. The marriage is pronounced null and void *ab initio*. Not only are they not now married, but they never were."

A party to a marriage is said to be impotent where there is a practical impossibility subsisting at the time of the marriage of consummating the marriage. In regard to the impotency of a male spouse, under no circumstances is it possible for the female at or before her marriage to him to know about his physical defect as regards impotency. In such circumstances, it is clearly no fault of the female spouse in getting married to someone who is impotent and it is proper and reasonable therefore to say that if the female spouse subsequently obtains a decree of nullity on the ground of impotency of the husband such decree should have the effect of rendering the marriage void *ab initio* and restore the female to the position of not having been married at all in the eyes of the law. I am therefore in entire agreement with the meaning in the case of *Wombwell's Settlement*, but what I have to decide is whether the ruling in that case can apply to the present case before the court. Here we have the case where the female spouse namely P., daughter of the respondent, wilfully refused to consummate the marriage. It is solely her conduct that has resulted in the decree of nullity. I am in entire agreement with the cases quoted above and with the submission of counsel for the appellant that the word "unmarried child" in section 48 of the Income Tax Act, 1967 must be given its ordinary meaning which in the words of Pearson J. in *Re Sergeant* means "never having been married". With due respect I must say that I am unable to agree with the Special Commissioners that "the marriage of P. was voidable yet upon its annulment by the High Court it became void *ab initio*." I hold the view that the case of *Re Wombwell's Settlement* can be distinguished from the present case, for here we are dealing not with the question of impotency, but with a question of wilful refusal to consummate the marriage.

After having considered the various authorities I have come to the conclusion that the decree of nullity on the ground of impotence should always have the effect of nullifying the marriage *ab initio* and thus putting the parties in a position of never having been married. The reason for this is that the marriage should or would never have taken place if the impotence of one spouse had come to the knowledge of the other at or before the time of the marriage. On the other hand in the case of wilful refusal to consummate the marriage the decree cannot possibly have the same effect because both the parties entered into the bond of marriage with a view to consummation, and wilful refusal to consummate by one of the spouses amounts to a deliberate breach of such bond and such breach can be deemed to have been committed only from the time of the wilful refusal to consummate. I am therefore of the view that a decree of nullity in such circumstances cannot have the effect of nullifying the marriage *ab initio*.

I therefore rule that the decree of nullity in this case does not and cannot have the effect of reverting P. to the position of an "unmarried child" for the purpose of section 48 of the Income Tax Act, 1967. In view thereof, the respondent is not entitled to the deduction that he has claimed and I therefore set aside the deciding order of the Special Commissioners dated 9 August 1973 and in its place substitute an order that the Notice of Assessment dated 26 August 1972 be confirmed.

As to costs I have taken into account that the respondent was unrepresented and that the amount of money involved is by no means large. At the hearing before me both parties indicated that they would not press for costs irrespective of the result of the appeal. For this reason, I order that each party will bear his own costs.

Order accordingly.

LIM HENG HOO v. TAN HOCK HAI & ORS.

[F.C. Azmi L.P., Gill and Ali F.JJ.) December 13, 1973]
[Kuching — Federal Court Civil Appeal No. 14 of 1973]

Practice and Procedure — Action dismissed for want of prosecution — Failure to enter action for trial within prescribed time — No valid excuse for delay — R.S.C. 1957, O. 36.

In this case the appellant, as tenant, had brought an action against the respondents, his landlords, claiming damages and an injunction for nuisance or trespass. Shortly after the filing of the writ he obtained a temporary injunction, the effect of which was to restrain the respondents from continuing their development work on the part of the land not occupied by the appellant but close to the house in which he lived. All the pleadings had been delivered and the pleadings closed some time in May 1971. In January 1972 the respondents applied to have the action dismissed for want of prosecution on the ground that the appellant failed to enter the action for trial within the time prescribed by the Rules of the Supreme Court.

The application was allowed in the High Court and the appellant appealed.

Held: there was a prolonged and inexcusable delay in this case and such delay prejudiced the respondents and therefore the High Court had properly exercised its discretion in allowing the application for the action to be dismissed for want of prosecution.

Case referred to:-

(1) *Allen* v. *Sir Alfred McAlpine & Sons Ltd.* [1968] 1 All E.R. 543.

T. O. Thomas for the appellant.

J. Grimberg (*Mathew Chan* with him) for the respondent.

Ali F.J. (read by **Lee Hun Hoe Ag. C.J. (Borneo)**): We dismissed this appeal on the date of hearing and now give our reasons for so doing.

The appeal was against the judgment of the High Court at Kuching, Sarawak whereby on an application by the respondents the appellant's action was dismissed for want of prosecution. The appellant, as

tenant, brought the action against his landlords, the respondents, claiming damage and injunction for nuisance or trespass. Shortly following the filing of the writ he applied by notice of motion and obtained a temporary injunction, the effect of which was to restrain the respondents from continuing with their development work on that part of the land not occupied by the appellant but close to the house in which he lived. The respondents have in the meantime filed their respective defences and have also counter-claimed for damages. The appellant has filed his replies to the defences as well as his defences to the counter-claims. All these took place sometime in May, 1971.

In January, 1972, i.e. some seven months later, the respondents applied by summons in chambers to have the action dismissed for want of prosecution under O.36 of the Rules of the Supreme Court on the ground that the appellant failed to enter the action for trial within the time prescribed by the Rules.

The application was supported by affidavits in the usual form. The affidavit in reply filed by the appellant sought to put the blame for the delay on the lawyer's clerk who admitted in the affidavit that it was his fault for having mislaid the necessary papers and for having forgotten to file them in time. That in itself, of course, is not a valid excuse.

At the hearing of the application before B.T.H. Lee J. who granted the temporary injunction the court was informed that the entry of the action for trial has just been filed. That, of course, is beside the point. However, the matter was adjourned to March, 1972 to open court for arguments. In March nothing happened. In the meantime several affidavits were filed mainly by the appellant. The hearing took place and concluded in May, 1972 when judgment was reserved. In August, 1972 the learned judge delivered his judgment allowing the application in terms. That, however, was not the end for in October, 1972 the appellant pursuant to O.54 applied to have the matter further argued. This was granted. Before the hearing of further arguments more affidavits were filed. The court again reserved decision until January, 1973 when in another written judgment the learned judge confirmed his previous decision. As may be observed it took almost a year for the matter to be concluded.

After hearing arguments we dismissed the appeal indicating that we would give our reasons later.

On the affidavits before the court there was absolutely no valid excuse for the delay of seven months to enter the action for trial. *Prima facie* that was as good a ground as any for the court to exercise its discretion and dismiss the action for want of prosecution. However, the rule is that judicial discretion must be exercised in accordance with established principles. The relevant principles are well stated in *Allen* v. *Sir Alfred McAlpine & Sons Ltd.*[1] and the relevant passage of the judgment in that case appears in the written submissions as well as in the judgment of the court. Shortly put, there was a prolonged and inexcusable delay. It only remains for consideration whether such delay has prejudiced the respondents. It undoubtedly has. First, they were prevented by the temporary injunction from continuing with their development work on their own land. As owners they were clearly within their rights to develop the land. The temporary injunction was obtained without any evidence to prove nuisance or trespass. Delay in entering the action for trial means delay in providing the necessary proof. In this case the delay seems intentional and deliberate. There was clear evidence of such intention. We refer to the evidence of a letter dated May 9, 1972 from the appellant's solicitors, M/s Thomas & Co., to the magistrate which stated, *inter alia*, as follows:

"...In our view there is nothing to argue about the order of the High Court of which you should take judicial notice and is clearly binding on all the plaintiffs in the suit before the District Court. If you proceed with the case when the said order is in force you would, in our humble opinion, be acting in a manner discourteous to the High Court, if not contemptuous. So it is more than a question of jurisdiction."

The action before the District Court has nothing whatsoever to do with the appellant's action in the High Court. The former is a suit by the respondents to recover possession of that part of the land which was occupied by the appellant. By this letter it was clearly intended to mislead the magistrate into thinking that as long as the temporary injunction was in force the case in the District Court could not proceed. It was not only misleading but insolent to write to a presiding officer of a court of law and tell him under a veiled threat that to go on with the case would be acting in contempt of the High Court order. We are firmly of the view that in the circumstances of this case the court below has properly exercised its discretion.

Appeal dismissed.

Solicitors: *Thomas & Co.; Chan & Co.*

MOHAMAD SALLEH v. LAU SIOK KEE

[F.C. (Azmi L.P., Gill and Ali F.JJ.) December 13, 1973]
[Kuching — Federal Court Civil Appeal No. 21 of 1973]

Trust — Trust deed — Charge of land by trustees to secure loan — Order for sale of land — Right of beneficiary to question transaction — Whether beneficiary can seek to show that the loan is unenforceable under the Moneylenders Ordinance — Claim frivolous and vexatious.

In this case the trustees under a trust deed had charged certain land to the respondent. On failure to pay the balance of the loan, the respondent obtained an order to sell the charged land. The appellant, one of the beneficiaries, under the trust deed, applied for a declaration (a) against the trustees that they have no right or power to charge the land and (b) against the respondent that her claim was unenforceable under the Moneylenders Ordinance.

Held: (1) there was power to charge the trust property under the trust deed;

(2) as the appellant was not a party to the loan transaction or to the original action, he had no *locus standi* and no right to plead the Moneylenders Ordinance. The action was therefore vexatious and frivolous.

FEDERAL COURT.

T. O. Thomas for the appellant.

Ee Poh Teck for the respondent.

Ali F.J. (read by **Lee Hun Hoe Ag. C.J. (Borneo)**): We dismissed this appeal on the date of hearing and now give our reasons.